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URBAN DEVELOPMENT LEGISLATION FOR CITIES, BY CITIES

Kellen Zale

URBAN DEVELOPMENT LEGISLATION FOR CITIES, BY CITIES

*Kellen Zale**

Thank you so much for inviting me to speak as part of this symposium. It is a great honor to be here in the company of such distinguished speakers to learn about the impressive legacy of Senator Muskie.

My presentation today connects the legacy of Senator Muskie, and specifically, his work on urban development and Model Cities, to contemporary urban development legislation. Thus, this presentation picks up where my co-panelist, Don Nicoll, left off, by considering how the Model Cities legacy is both a foundation of and a counterpoint to contemporary urban development policies and programs.¹

While urban development legislation can come from any level of government, some of the most innovative legislative responses to the challenges faced by cities today are being crafted by local governments themselves.² Everyone here can probably think of examples of urban development legislation from their own city, whether it's Detroit addressing abandoned and vacant housing through a blight reduction plan;³ Seattle passing a living wage ordinance that will help accommodate the high cost of living in that city;⁴ San Francisco promoting community health through urban agriculture zoning;⁵ or New Orleans redeveloping public housing in the Treme by integrating subsidized and market-priced housing in a mixed-use development.⁶

While there are thousands of other examples from across the country, I

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1. See *supra* Donald E. Nicoll, *Model Cities, Senator Muskie and Creative Federalism*, 67 ME. L. REV. 255 (2015).

2. See Harold Meyerson, *The Revolt of the Cities*, THE AMERICAN PROSPECT LONGFORM, <http://prospect.org/article/revolt-cities> (last visited Feb. 24, 2015) (“[Cities] are, in short, enacting at the municipal level many of the major policy changes that progressives have found themselves unable to enact at the federal and state levels.”).

3. See Monica Davey, *Detroit Urged to Tear Down 40,000 Buildings*, N.Y. TIMES, May 27, 2014, at A1.

4. See Reid Wilson, *Seattle to enact \$15 minimum wage*, WASH. POST, June 2, 2014, <http://www.washingtonpost.com/blogs/govbeat/wp/2014/06/02/seattle-to-enact-15-minimum-wage/>; see also Gene Balk, *Census: Seattle saw steepest rent hike among major U.S. cities*, THE SEATTLE TIMES, September 18, 2014, <http://blogs.seattletimes.com/fyi-guy/2014/09/18/census-seattle-saw-steepest-rent-hike-among-major-u-s-cities/> (discussing census data that shows Seattle's median rent rose more steeply than any other U.S. city between 2010 and 2013, and listing Seattle's median rent as the 10th most expensive in the country).

5. See Eli Zigas, *California's New Urban Agriculture Property Tax Incentive*, SPUR.ORG (Oct. 2, 2013), <http://www.spur.org/blog/2013-10-02/california-s-new-urban-agriculture-property-tax-incentive>.

6. See Richard A. Webster, *New Orleans City Council approves demolition of Iberville Housing Development*, NEW ORLEANS TIMES-PICAYUNE (May 16, 2013, 5:38 PM), http://www.nola.com/politics/index.ssf/2013/05/new_orleans_city_council_appro_9.html.

mention these local urban development programs specifically for two reasons. First, they illustrate the incredible breadth of legislative innovation in our cities, innovation that the Model Cities program in many ways instigated, involving local legislators and mayors creatively confronting the specific issues that challenge their cities. But the second reason I cite these examples is because they stand in contrast to the federal Model Cities program: while the Model Cities legislation envisioned a top-down, federally driven, comprehensive approach to urban development, today's legislative responses to similar issues are often being initiated at the local level and specifically targeted to individual problems of a particular city.

While recognizing that Model Cities provided valuable lessons to lawmakers seeking to address the challenges of urban development, I believe there are several advantages to the types of locally initiated, targeted urban development legislation we see today. First, in terms of efficiency, when legislation focuses in on a single, discrete issue, it is less likely to get legislatively log-jammed than a more complicated, multi-issue piece of legislation. Second, while not universally true, local government lawmaking tends to be more streamlined than either the state or federal processes. Thus, while each piece of legislation may focus only on a single issue, there is a greater possibility that more single-issue laws overall will be passed via local governments than by higher levels of government. Finally, locally driven, targeted legislation can be more responsive to the specific issues that are of the most concern for a particular city. So, for example, in the examples mentioned above, we see Detroit taking the lead on legislation to address vacant and blighted property, San Francisco tackling legislation to promote urban agriculture, and New Orleans focusing on its public housing issues.⁷

However, while highlighting what I believe are advantages to these targeted, locally led urban development programs, I agree with my co-panelist, Don Nicoll, as well as what I believe Senator Muskie would remind us of: there is still a very important role for the federal government in urban development. While we often think of local governments as laboratories of democracy, local governments are limited power entities, sometimes referred to as creatures of the state.⁸ Thus, local governments often confront state-level barriers to their proposed urban development legislation, whether because of preemption or the doctrine of ultra vires or limited home rule authority or simply limited fiscal independence. In this context, the federal government can be instrumental in overcoming these constraints, in terms of providing funding and creating other incentives to enable local governments to enact legislation that might otherwise be stymied by structural or fiscal state roadblocks.

In the limited time remaining today, I would like to discuss three examples of local programs from across the country that illustrate the range of urban development issues local governments are taking the initiative on, as well as the potential state level hurdles they may face, and how the federal government can potentially play a role in navigating such roadblocks.

7. See *supra* notes 2, 3, 4, and accompanying text.

8. See Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 8 (1990) (“The formal legal status of a local government in relation to its state is summarized by the three concepts of ‘creature,’ ‘delegate’ and ‘agent.’”).

My first example is drawn from New York City's recent attempt to pass a congestion pricing plan in Lower Manhattan. This plan would have charged drivers \$8 to drive in a severely over-congested area of the city during peak hours.⁹ This was a locally led initiative, supported by Mayor Bloomberg, the city council, and a bi-partisan range of interest groups at the local level. The city of New York had even obtained \$350 million in federal Department of Transportation funding for traffic reduction, contingent on state approval of the congestion pricing plan.¹⁰ However, that contingency proved to be insurmountable. Because New York is a limited home rule state requiring state approval for new local taxes (which is what the congestion pricing was considered), the city had no authority to enact the plan unless it obtained approvals from both houses of the state legislature as well as the governor, which it failed to obtain.¹¹

I bring up New York City's failed congestion pricing legislation as my first example, because it illustrates how a local government which identified a quintessentially local problem—too many drivers in one particular area of the city, resulting in safety, pollution, and quality of life concerns—and which developed a legislative solution targeted specifically at that problem, nonetheless was frustrated in the implementation of this solution because of structural constraints imposed by state government, which even the promise of millions of dollars in federal funding could not overcome.

In contrast, my next example is a story of a local urban development success from the opposite side of the country. Over the past few years, San Francisco has been faced with a situation where parcels of highly valuable urban land were being held undeveloped or underused (as parking lots, for example) by owners holding onto their property until the prices in the real estate market rise—as they inevitably seem to do in San Francisco. Community health advocates saw an opportunity to utilize these undeveloped parcels for community gardens and other urban agriculture uses. But to make such uses practical, they needed to be able to enter into multi-year leases for the property, rather than just operating on month-to-month or handshake agreements while landowners waited for a developer's offer on the lots. To address this situation, stakeholders and city officials came together to develop a plan to add an urban agriculture zone to the city's zoning, in which landowners who entered into multi-year leases for urban agriculture activities would be granted a significant property tax reduction.¹²

Yet here too, the city could not act unilaterally to enact its locally driven, targeted urban development legislation. Despite the fact that California, unlike New York, is a strong home rule state, as well as the fact that land use is a quintessentially local area of law, because the new zoning included a change in the property tax rate, the city needed state authority to act. Unlike the New York example discussed above, in California, the state legislature did pass a state law authorizing cities to adopt this type of urban agriculture/property tax incentive

9. See Erin Adele Scharff, *Taxes as Regulatory Tools: An Argument for Expanding New York City's Taxing Authority*, 86 N.Y.U. L. REV. 1556, 1556 (2011).

10. Nick Confessore, *Congestion Pricing Plan Dies in Albany*, NEW YORK TIMES, Apr. 7, 2008, <http://cityroom.blogs.nytimes.com/2008/04/07/congestion-pricing-plan-is-dead-assembly-speaker-says/>

11. *Id.*

12. Zigas, *supra* note 5.

zoning.¹³ As a result, San Francisco has now enacted this type of urban agriculture zoning law, and other cities in California are also considering doing so.¹⁴ And while there was no federal government involvement in this particular example of urban development legislation, there may potentially be ways that the federal government could incentivize this type of local legislation through overcoming hurdles at the state level.

The final example I will discuss comes from the city of New Orleans. The city and its housing authority have partnered with the state, the federal Housing and Urban Development Agency (HUD), and a private developer to undertake a \$600 million redevelopment of the last remaining public housing project in the city, Iberville-Treme, located in a historic area of the same name just north of the French Quarter.¹⁵ The project will replace the existing public housing units, as well as include the preservation of multiple historic buildings, the development of market-rate housing, commercial and retail uses, and the eventual re-installment of the streetcar named Desire.¹⁶

The Iberville-Treme redevelopment project clearly echoes Model Cities in many ways by involving the coordination of federal, state, and local levels of government in an infrastructure project—a traditional area of urban development. Furthermore, the federal government played a key role, not only in the infusion of funding for the project but also through the policies developed under HUD's Choice Cities program to provide a framework for urban development initiatives. Yet, the Iberville-Treme plan is also similar to the other contemporary, targeted, locally-driven legislation I have been discussing: it is geographically targeted at a relatively small neighborhood in a key location in the city, and rather than trying to be an all-encompassing solution to every problem faced by that neighborhood at once, the primary focus is on the redevelopment and integration of public and market-rate housing and associated uses.

My presentation today is just a very brief introduction to complicated policy questions regarding urban development that legislators at all levels of government face. As suggested above, there are advantages in terms of both efficiency and responsiveness to local governments taking the lead on urban development legislation. But there remains an important role for the federal government to play as well. To borrow the phrase used by my co-panelist, Don Nicoll, "creative federalism" can enable local governments to implement programs like the ones discussed above by enabling local governments to navigate potential fiscal and structural hurdles at the state level.

13. *Id.*

14. *Id.*

15. Webster, *supra* note 6.

16. *Id.*

